Supreme Court, U.S.
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No. 98-___

In The

Supreme Court of the United States

October Term, 1998

DANIEL MAGAÑA-PIZANO,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Respondent, a legal permanent resident for more than twenty years who is deportable based on a single misdemeanor drug offense, is being held in executive custody and has been ordered deported based on the Attorney General's retroactive application of a 1996 amendment to the Immigration and Nationality Act (INA). After exhausting administrative remedies, respondent filed both a habeas corpus action in district court and, alternatively, a petition for review directly in the court of appeals to challenge his final deportation order on constitutional and non-constitutional grounds. The court of appeals, finding that both its own and the district court's jurisdiction was repealed by new INA amendments, held that preclusion of all review violated the Constitution and that the district court retained jurisdiction under 28 U.S.C. 2241 over both claims. The question presented is:

1. Whether the Antiterrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) repealed the jurisdiction of both the courts of appeals and the district courts over challenges to a deportation order raising claims of statutory construction and constitutional violation and, if so, whether AEDPA and IIRIRA violate the Suspension of Habeas Corpus Clause, Article III or the Due Process Clause of the Constitution.

OPINIONS BELOW

Daniel Magaña-Pizano, respondent in *INS v. Magaña-Pizano*, No. 98-836, refers the Court to the Opinions Below section in Respondent's Brief in Opposition in No. 98-836, filed simultaneously with this cross-petition on December 21, 1998, and to the government's Petition for Certiorari, which was docketed on November 19, 1998.

JURISDICTION

Cross-petitioner refers the Court to the Jurisdiction section in Respondent's Brief in Opposition to Certiorari in No. 98-836, filed simultaneously with this cross-petition on December 21, 1998, and to the government's Petition for Certiorari, which was docketed on November 19, 1998.

STATUTES OR OTHER PROVISIONS INVOLVED

Cross-petitioner refers the Court to the Statutes or Other Provisions Involved section in the Petition for Certiorari and Respondent's Brief in Opposition in No. 98-836.

STATEMENT

Daniel Magaña-Pizano conditionally cross-petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Ninth Circuit that the court of appeals lacked jurisdiction over his petition

for review. Cross-petitioner requests that this conditional cross-petition be granted if the Court grants the petition filed by the Solicitor General in *INS v. Magaña-Pizano*, No. 98-836. Cross-petitioner, however, opposes the grant of that petition. *See* Respondent's Brief in Opposition, *INS v. Magaña-Pizano*, No. 98-836 (filed Dec. 21, 1998).

The Board of Immigration Appeals (BIA) issued cross-petitioner a final order of deportation on March 14, 1998. Pet. App. 53a. The BIA based its order on *Matter of Soriano* (Pet. App. 99a), in which the Attorney General held that Section 440(d) of the Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, 1277, applied retroactively to deprive legal permanent residents like cross-petitioner of statutory eligibility to apply for relief from deportation under Section 1182(c) of the Immigration and Nationality Act (INA).

Cross-petitioner challenged the BIA's final order of deportation by filing a habeas corpus petition in district court and, when the district court dismissed his habeas petition for lack of jurisdiction, by appealing the dismissal and by filing a timely petition for review directly in the court of appeals pursuant to 8 U.S.C. 1105a, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. No. 104-208, Div. C., 110 Stat. 3009-549. The court of appeals consolidated the habeas appeal and the petition for review. In the consolidated appeal, cross-petitioner challenged the BIA's final order of deportation on the grounds that, *inter alia*, (1) the Attorney General erred as a matter of law when she held in *Matter of Soriano* that AEDPA Section 440(d) applied retroactively to convictions occurring before AEDPA's enactment, and (2) irrespective of

whether Section 440(d) applies retroactively, it violates equal protection by depriving deportable but not excludable legal resident immigrants of eligibility for discretionary relief.

In regard to jurisdiction, cross-petitioner sought judicial review of both his constitutional and statutory claims either in a habeas corpus action in district court or by a petition for review in the court of appeals. The court of appeals dismissed the petition for review and held that cross-petitioner was entitled to raise both his claims in a district court habeas corpus action. Pet. App. 24a. The court remanded the habeas petition to the district court for a ruling on the merits without expressing a view on either the retroactivity or the equal protection claim. *Id.* The government then filed a petition for *certiorari* to this Court. The government now concedes that the court of appeals had jurisdiction on direct review over cross-petitioner's constitutional equal protection claim. Pet. Br. 19 ("The court of appeals . . . erred in construing Section 309(c)(4)(G) as precluding review of respondent's constitutional challenge"). It further asserts that jurisdiction over any other claim that is reviewable must lie exclusively in the court of appeals, but contends that no court has jurisdiction to hear cross-petitioner's particular retroactivity claim. Pet. Br. 20-21, 23. Finally, the government argues that if cross-petitioner's statutory claim is reviewable, review should occur "in the court of appeals on petition for review. . . . [because] [s]uch a construction of Section 309(c)(4)(G) would be far more harmonious with

Congress's general design in IIRIRA than is the result reached by the courts of appeals." Pet. Br. 24-25.

REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITION

In the event the Court grants the government's *certiorari* petition in *Magaña-Pizano,* this conditional cross-petition should be granted as well. Cross-petitioner filed both a habeas corpus action and a petition for review. If the Court grants the government's petition to consider the jurisdiction of the federal courts to review cross-petitioner's claims, cross-petitioner would pursue – as he did in the court of appeals – his claim to judicial review pursuant to the jurisdiction of either the district court or the court of appeals. Insofar as necessary, cross-petitioner would seek to modify the court of appeals' holding that it lacked jurisdiction over his petition for review. Accordingly, respondent files the instant conditional cross-petition. Cross-petitioner's conditional cross-petition is filed as a protective matter to ensure that the Court perceives no impediment to considering the jurisdictional questions regarding the jurisdiction of *both* the courts of appeals *and* the district courts in this case. *See* Pet. Br. 27-29.[1] This case (unlike *Reno v. Goncalves,* No. 98-835), along with the instant conditional cross-petition, presents

[1] Cross-petitioner believes that the government's petition for *certiorari* in *INS v. Magaña-Pizano,* No. 98-836, presents the jurisdiction of both the district court and the court of appeals, but he files this petition as a protective matter.

the Court with a complete procedural vehicle for addressing the federal courts' jurisdiction to review statutory and constitutional challenges to a final deportation order.

CONCLUSION

For the reasons stated, in the event the petition for *certiorari* filed in No. 98-836 is granted, this conditional cross-petition should be granted as well.

Respectfully submitted,

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No. 98-1011

In the Supreme Court of the United States

OCTOBER TERM, 1998

DANIEL MAGANA-PIZANO, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE CROSS-RESPONDENT

SETH P. WAXMAN
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QUESTION PRESENTED

Whether Section 440(a) of the Antiterrorism and Effective Death Penalty Act of 1996 and Section 309(c)(4)(G) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 deprived the court of appeals of jurisdiction over cross-petitioner's petition for review of his deportation order.

In the Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-1011

DANIEL MAGANA-PIZANO, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE CROSS-RESPONDENT

As explained in detail in our petition for a writ of certiorari in *INS* v. *Magana-Pizano*, No. 98-836 (filed Nov. 18, 1998), cross-petitioner is an alien deportable by reason of having been convicted of a controlled substance offense. On May 17, 1996, the Immigration and Naturalization Service commenced deportation proceedings against him. Cross-petitioner conceded his deportability but applied for discretionary relief from deportation under 8 U.S.C. 1182(c) (1994). The Board of Immigration Appeals (BIA), however, concluded that he was ineligible under Section 1182(c) for such relief. The BIA followed the Attorney General's decision in *In re Soriano* (98-836 Pet. App. 99a-112a), that Section 440(d) of the Antiterrorism and Effective Death

Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1277, which amended Section 1182(c) to render aliens convicted of controlled substance offenses ineligible for relief, should be applied in all pending deportation proceedings. See 98-836 Pet. 8-10.

Cross-petitioner then filed a petition for review of his deportation order in the court of appeals, pursuant to 8 U.S.C. 1105a(a) (1994), and also filed a petition for a writ of habeas corpus in district court under the general federal habeas corpus statute, 28 U.S.C. 2241. He argued both that the Attorney General's decision in *Soriano* was wrong as a matter of statutory interpretation, and also that Section 1182(c) violated constitutional equal-protection principles insofar as it had been construed by the BIA to deny eligibility for discretionary relief to aliens placed in deportation proceedings in the United States, but not aliens seeking admission to the United States from abroad. The district court dismissed his habeas petition, and he appealed to the court of appeals, which consolidated that appeal with his direct petition for review. The court of appeals then concluded that (a) Section 309(c)(4)(G) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-626, deprived it of all jurisdiction over the petition for review; (b) 8 U.S.C. 1252(g) (Supp. II 1996), as amended by IIRIRA, deprived the district court of jurisdiction over the habeas corpus petition; but (c) that deprivation of judicial review violated the Suspension of Habeas Corpus Clause, U.S. Const. Art. I, § 9, Cl. 2; and so (d) as a remedy for that purported unconstitutional suspension of judicial review, the district court should be permitted to exercise jurisdiction over cross-petitioner's claims under the general habeas corpus statute, 28 U.S.C.

2241. The court of appeals accordingly remanded the case to the district court for further proceedings on the habeas corpus petition. See 98-836 Pet. 10-14.

The government has filed a petition for a writ of certiorari, asking this Court to review the court of appeals' determination that the district court could exercise habeas corpus jurisdiction under 28 U.S.C. 2241 to review cross-petitioner's challenges to his deportation order. In our petition for a writ of certiorari, we explain (at 16-22) that, although neither the district court nor the court of appeals has jurisdiction to review the merits of the Attorney General's decision in *Soriano*, the court of appeals does have jurisdiction to review cross-petitioner's constitutional challenge to a provision of the Immigration and Nationality Act itself, notwithstanding Section 440(a) of AEDPA and Section 309(c)(4)(G) of IIRIRA. We argue further that, if (contrary to our submission) the Constitution requires that some court have jurisdiction over cross-petitioner's non-constitutional challenge to the Attorney General's denial of his request for discretionary relief from deportation, that court is the court of appeals, on direct petition for review, and not the district court, on a collateral habeas corpus petition. See 98-836 Pet. 18-21, 24-25.

The alien now has filed a conditional cross-petition for a writ of certiorari, seeking review of the court of appeals' dismissal of his petition for review for lack of jurisdiction; he urges the Court to grant his cross-petition if it grants our principal petition (although he urges the Court to deny our petition). We agree that the cross-petition should be granted if (as we urge) the Court grants our petition, and that the two cases should be consolidated for briefing and oral argument. If the Court agrees with our submission that Section 440(a) of

AEDPA and Section 309(c)(4)(G) of IIRIRA do not deprive the court of appeals of all jurisdiction over the constitutional claim in the petition for review (see 98-836 Pet. 16-20), and that Section 1252(g)'s restriction on the district court's jurisdiction therefore presents no constitutional difficulty, it would reverse the court of appeals' judgment insofar as it remanded the case to the district court for further proceedings on the habeas corpus petition. Absent a cross-petition, however, the Court might not have the authority also to reverse the court of appeals' dismissal of cross-petitioner's petition for review and to direct that that petition be heard on the merits of whatever claims are not barred by Section 440(a) of AEDPA and Section 309(c)(4)(G) of IIRIRA. It appears that such a result would grant relief beyond that awarded by the court of appeals, which ordinarily can be ordered only if a cross-petition for a writ of certiorari is filed. See *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 119 n.14 (1985). To ensure that the Court has the authority to address all the jurisdictional questions presented in the case, and also to grant complete relief, the cross-petition should be granted and consolidated with our petition for briefing and oral argument.

* * * * *

For the foregoing reasons, the conditional cross-petition for a writ of certiorari should be granted and

consolidated with the petition for a writ of certiorari in *INS* v. *Magana-Pizano*, No. 98-836, for briefing and oral argument.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

DECEMBER 1998